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No. 192

In the Supreme Court of the United States

OCTOBER TERM, 1959

SOMERSET MACHINE & TOOL COMPANY, A COPARTNERSHIP CONSISTING OF EVERETT J. CANNING, J. H. CANNING, AND DORIS CANNING, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the United States Court of Claims (Pet. App. 1a–3a) is not yet reported.

JURISDICTION

The judgment of the Court of Claims was entered on January 14, 1959. A timely petition for rehearing was denied by that court on April 8, 1959. The petition for certiorari was filed on July 7, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether any claims petitioner may have had against the United States under the Contract Settlement Act of 1944, arising out of its World War II subcontract, are barred by the time limitations of that Act.

STATUTE INVOLVED

Pertinent provisions of the Contract Settlement Act of 1944, 58 Stat. 649, 41 U.S.C. (1952 ed.) 101–125, are set forth in the Appendix, *infra*, pp. 12–15.

STATEMENT

Petitioner, the third in a series of subcontractors under a prime War Department contract for bullets which was terminated in 1944, filed this action against the United States to recover compensation for its work as a subcontractor. It claims compensation under Sections 7 and 17 of the Contract Settlement Act of 1944, 58 Stat. 649, 655, 665, 41 U.S.C. 107, 117. The Court of Claims granted a motion by the Government to dismiss the complaint (Pet. App. 1a–3a).

The essential facts, as alleged in the complaint or incorporated therein as exhibits, are as follows: On April 23, 1943, petitioner entered into a contract with the B.-M. Machine Works to furnish 40 million .30 calibre bullet cores to The Cuneo Press, Inc. The B.-M. Machine Works, in turn, was under a contract to furnish cores to the Nelco Corporation, which was a subcontractor of Cuneo Press. Cuneo held a prime contract to supply bullets to the United States (Cplt. 2, ¶1).[1]

[1] "Cplt." refers to the original pleading and its attached exhibits filed by petitioner in the court below.

According to the complaint, petitioner was persuaded to enter into its contract with the B.-M. Machine Works "through urging of representatives of the War Production Board and assurance that payment would be protected by the Government" (Cplt. 2).

Petitioner had shipped to Cuneo more than half of the total number of bullet cores required under its contract with B.-M. when on June 23, 1944, it was notified by B.-M. that the prime contractor would not accept shipments after June 29, 1944 (Cplt. 2). Thereafter, petitioner filed termination claims with all contractors higher in the chain of contracts, and with the New York and Chicago Ordnance Districts (Cplt. 2–3). The Cuneo Press, Inc., has taken the position that petitioner was not, at any time, a subcontractor under its prime contract with the United States (Cplt. 25).

Although the matter was investigated by the New York Ordnance District, no settlement negotiations were undertaken by representatives of the Government (Cplt. 3). Finally, on September 11, 1950, petitioner filed a settlement proposal with the Chicago Ordnance District claiming $12,199.69 plus interest under Section 107(f) of the Contract Settlement Act of 1944 (Cplt. 3, 8). On February 28, 1956, the contracting officer for the Chicago Ordnance District advised counsel for petitioner by letter that no claim under the Contract Settlement Act could arise in favor of second and third tier subcontractors under the subcontract between the Neloc Corporation and Cuneo Press. He noted that in a suit by Neloc

Corporation against the Cuneo Press, Inc., in the District Court for the Northern District of Illinois, that the subcontract was held to have been terminated and settled prior to passage of the Contract Settlement Act of 1944. The contracting officer concluded that the effect of the ruling in that action was to destroy the contractual chain which would have permitted lower tier subcontractors to recover under the Contract Settlement Act (Cplt. 4, 20).

On August 8, 1957, petitioner's counsel was advised, in response to an inquiry, that the contracting officer's letter of February 28, 1956, was a ruling on the termination claim filed by petitioner with the Chicago Ordnance District (Cplt. 4, 23).

Nearly two years after the letter from the Chicago Ordnance District denying petitioner's claim, and more than five months after that agency's second letter explaining that the letter of February 28, 1956, was a ruling, petitioner, on January 21, 1958, filed this suit in the Court of Claims. The Government moved to dismiss on two grounds: (1) that petitioner's claim under an alleged contract with the United States was barred by the six-year statute of limitations covering suits in the Court of Claims, 28 U.S.C. 2501; and (2) that its claims under the Contract Settlement Act were barred by the limitations in Section 13(c)(2) of that Act (41 U.S.C. (1952 ed.) 113(2)), which requires that actions challenging written terminations under the Act be filed within 90 days.

The Court of Claims granted the Government's motion (Pet. App. 1a–3a). It did not rule on the

the B.-M. Machine Works were allowed to grow stale. Then, nearly six years after the contract was terminated, it attempted to revive them by filing a new termination claim with the Chicago Ordnance District of the Department of the Army. Again the claims were allowed to grow stale.

On February 28, 1956, petitioner was advised by the contracting officer of the Chicago Ordnance District that its claim was denied. This letter clearly stated the reason for this determination—that lower tier subcontractors had no rights under the prime contract. Whether right or wrong, the effect of this ruling was to start the running of the 90-day period within which petitioner was required to file its action in the district court or in the Court of Claims. If there was any doubt about whether the letter of February 28, 1956 was a ruling, it was certainly clarified by the agency's letter of August 8, 1957. Even if the latter date be taken as the date on which the agency's ruling became final, it is plain that petitioner's action in the Court of Claims was late, since it was not filed until January 21, 1958.

Petitioner seeks to escape the effect of the 90-day limitation by arguing that neither the letter of February 28, 1956, nor the letter of August 8, 1957, constituted "findings" within the meaning of the Act. But the "findings" referred to in Section 13(a) of the Act are, to use the language of that Section, no more than "written findings indicating the basis of the determination * * *". If the determination is a complete denial of the claim, accompanied by an explanation of the reasons for this denial, then this satisfies the Act's requirements by furnishing a clear basis for

review in the courts of the agency's determination. The letter of February 28, 1956, obviously constituted the required findings. The petitioner failed to file suit within 90 days after delivery of the written determination. Thus, the decision of the Court of Claims, holding that petitioner's complaint is barred by Section 13(*c*) of the Act, is clearly correct.

In any event, questions involving the limitations provisions of the Contract Settlement Act of 1944 no longer have any general importance. Administrative activities under that Act have been almost completely liquidated. The Appeal Board established by Section 13(d) of the Act was abolished by Congress effective January 13, 1953 (Act of July 14, 1952, 66 Stat. 627) because there remained so few war claims still unsettled (see H. Rept. 2261, 82nd Cong., 2d Sess.), and as of last report—three years ago—only eleven cases under the Act were still before the contracting agencies. Annual Report of the Administrator of General Services for the year ending June 30, 1956, pp. 85–86.[2] It is plain, therefore, that the Court of Claims ruling in this case does not present any question of public importance.

2. As an alternative theory, petitioner alleges that assurances of representatives of the War Production Board, that payment on its contract with the B.-M.

[2] Under Section 102(b) of the Act of June 30, 1949, 63 Stat. 380, the supervision of administration of the Contract Settlement Act was transferred to the Administrator of General Services. We are informally advised by the General Services Administration that there are at present no personnel specifically assigned to perform any functions under the Contract Settlement Act.

Machine Works would be protected by the United States, created an implied contract. Petitioner relies upon the doctrine of promissory estoppel as the basis for its contract with the United States, citing *Restatement of Contracts,* Section 90. It finds authority for the courts to impose liability upon the United States under such a theory in Section 17 of the Contract Settlement Act (41 U.S.C. 117). (Pet. 14–17). This section permits payments to contractors and subcontractors who furnished war materials under technically defective agreements made in reliance upon the apparent authority of Government agents.

The procedure for review of claims under Section 17, however, is, as provided in Section 17(c), governed by limitations set forth in Section 13. Thus, even if it be assumed *arguendo* that plaintiff's termination claim attempted to invoke the provisions of Section 17, the denial of his claim by the letter of February 28, 1956, as confirmed by the second letter of August 8, 1957, plainly required that petitioner begin its action for relief under Section 17 within 90 days. For the same reasons that its claim under Section 7(f) is barred, its claim under the provisions of Section 17 is also barred.

In fact, however, nowhere does petitioner allege ever having filed a claim for relief with the contracting agency under the terms of Section 17. As far as the record discloses, petitioner's entire claim was based upon Section 7(f) (Cplt. 8). Although the complaint alleges that an investigation of its claim was undertaken by agents of the United States, we

think it plain that investigation alone does not constitute acceptance of a contractual obligation to pay anything. The complaint does not show that the United States ever undertook to settle petitioner's claim as a defective contract under the provisions of Section 17, and does not state a cause of action under that section.

Petitioner contends (Pet. 4–5) that it was denied an opportunity to argue this point by the Court of Claims because the court noticed it *sua sponte*. There is no reason, however, why the Court of Claims, or any other court of first impression, should be foreclosed from holding that a complaint does not state a cause of action when it obviously does not. In any event, petitioner had ample opportunity, in its motion for rehearing, to present its contention that it had stated a cause of action.

Finally, petitioner's contention that it enjoyed some kind of promissory rights under Section 17 presents questions of no greater importance than do its contentions under the other provisions of the Contract Settlement Act. Section 17 was amended more than five years ago to provide that no compensation shall be paid on claims under that Section filed 180 days after June 28, 1954 (Act of June 28, 1954, 68 Stat. 300). Like other sections of the Contract Settlement Act, it is a mere vestige.

question of whether petitioner's complaint was barred by the six-year statute of limitations. However, it held that petitioner's claim was barred by the 90-day limitation contained in Section 13(c)(2) of the Contract Settlement Act (Pet. App. 2a–3a). Moreover, it held that the complaint failed to state a cause of action in contract. The complaint did not show that the Government had agreed to pay petitioner anything, and there was, therefore, no privity of contract between petitioner and the Government. A petition for rehearing attacking all aspects of the Court of Claims decision was denied on April 8, 1959 (Pet. 2).

ARGUMENT

This case involves no more than a tardy effort to obtain judicial enforcement of alleged rights under a contract between private parties dating from World War II. Petitioner seeks to impose liability on the United States under the World War II statute for termination of war contracts. The program for termination of war contractors' claims under the Contract Settlement Act has long since been wound up. Petitioner's contentions under that Act obviously present no question of general importance which would merit review by this Court.

1. In order to facilitate production for World War II, the Congress, in 1944, passed the Contract Settlement Act (Act of July 1, 1944, 58 Stat. 649, 41 U.S.C. 101–125). Section 7(f) of that Act (41 U.S.C. 107(f)) provided that contracting agencies *may* pay compensation to subcontractors who cannot otherwise recover where, in the circumstances of the particular case,

equity and good conscience require that such compensation be paid. The Act contemplated settlement by agreement, and where this was not possible, by the contracting agency's unilateral determination. Section 6(c), 41 U.S.C. 106(c). Under Section 13(b) of the Act (41 U.S.C. 113(b)), war contractors, including subcontractors, aggrieved by an agency's unilateral determination or by its failure to determine the amount due on a claim under the Act, or by its failure to prepare written findings indicating the basis of its determination, could file suit in the Court of Claims or in the district court to recover on their claim. In the alternative, at their election, they could first appeal the contracting agency's action to the Appeal Board established by Section 13(d) of the Act.

Under Section 13(c), when the contracting agency made a unilateral settlement of a termination claim, the war contractor could, within 90 days after delivery of the findings, begin proceedings in the courts or before the Appeal Board. If, after a demand, the agency refused to make written findings showing the basis of its determination, the war contractor was allowed one year from the date of its demand for findings to initiate proceedings in the courts or before the Appeal Board.

Petitioner thus had the right, after it filed its claim with the contracting agency, to make a written demand for findings which would enable it to initiate action in court to recover on its claims, or to carry its claims to the Appeal Board. It did not exercise this right. Instead, the claims which it submitted at an unspecified date after termination of its contract with

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1959.

APPENDIX

The Contract Settlement Act of 1944, 58 Stat. 649, as amended, 41 U.S.C. 101–125, provides in pertinent part as follows:

Section 7 [41 U.S.C. 107]:

* * * * * *

(f) If any contracting agency determines that in the circumstances of a particular case equity and good conscience require fair compensation for the termination of a war contract to be paid to a subcontractor who has been deprived of and cannot otherwise reasonably secure such fair compensation, the contracting agency concerned may pay such compensation to him although such compensation already has been included and paid as part of a settlement with another war contractor.

* * * * * *

Section 13 [41 U.S.C. 113]:

(a) Whenever the contracting agency responsible for settling any termination claim has not settled the claim by agreement or has so settled only a part of the claim, (1) the contracting agency at any time may determine the amount due on such claim or such unsettled part, and prepare written findings indicating the basis of the determination, and deliver a copy of such findings to the war contractor, or (2) if the termination claim has been submitted in the manner and substantially the form prescribed under this chapter, the contracting agency, upon written demand by the war contractor for such findings, shall determine the amount due on the claim or unsettled part and

prepare and deliver such findings to the war contractor within ninety days after the receipt by the agency of such demand. In preparing such findings, the contractor agency may require the war contractor to furnish such information and to submit to such audits as may be reasonably necessary for that purpose. Within thirty days after the delivery of any such findings, the contracting agency shall pay to the war contractor at least 90 per centum of the amount thereby determined to be due, after deducting the amount of any outstanding interim financing applicable thereto.

(b) Whenever any war contractor is aggrieved by the findings of a contracting agency on his claim or part thereof or by its failure to make such findings in accordance with subsection (a) of this section, he may, at his election—

(1) appeal to the Appeal Board in accordance with subsection (d) of this section; or

(2) bring suit against the United States for such claim or such part thereof, in the Court of Claims or in a United States district court, in accordance with subsection (20) of section 41 of Title 28, except that, if the contracting agency is the Reconstruction Finance Corporation, or any corporation owned or controlled by the United States, the suit shall be brought against such corporation in any court of competent jurisdiction in accordance with existing law.

(c) Any proceeding under subsection (b) of this section shall be governed by the following conditions:

(1) When any contracting agency provides a procedure within the agency for protest against such findings or for other appeal therefrom by the war contractor, the war contractor, before proceeding under subsection (b) of this section, (i) in his discretion may resort to such procedure within the time specified in his contract or, if no time is specified, within thirty days after the delivery to him of the findings;

and (ii) shall resort to such procedure for protest or other appeal to the extent required by the Administrator of General Services, but failure of the contracting agency to act on any such required protest or appeal within thirty days shall operate as a refusal by the agency to modify its findings. Any revision of the findings by the contracting agency, upon protest or appeal within the agency, shall be treated as the findings of the agency for the purpose of appeal or suit under subsection (b) of this section. Notwithstanding any contrary provision in any war contract, no war contractor shall be required to protest or appeal from such findings within the contracting agency except in accordance with this paragraph.

(2) A war contractor may initiate proceedings in accordance with subsection (b) of this section (i) within ninety days after delivery to him of the findings by the contracting agency, or (ii) in case of protests or appeal within the agency, within ninety days after the determination of such protest or appeal, or (iii) in case of failure to deliver such findings, within one year after his demand therefor. If he does not initiate such proceedings within the time specified, he shall be precluded thereafter from initiating any proceedings in accordance with subsection (b) of this section, and the findings of the contracting agency shall be final and conclusive, or if no findings were made, he shall be deemed to have waived such termination claim.

* * * * * *

(d) [The Appeal Board established by section 13(d) of the Act was abolished by the Act of July 14, 1952, 66 Stat. 627.]

* * * * * *

Section 17 [41 U.S.C. 117]:

(a) Where any person has arranged to furnish or furnished to a contracting agency or to a war contractor any materials, services, or facilities related to the prosecution of the war,

without a formal contract, relying in good faith upon the apparent authority of an officer or agent of a contracting agency, written or oral instructions, or any other request to proceed from a contracting agency, the contracting agency shall pay such person fair compensation therefor.

(b) Whenever any formal or technical defect or omission in any prime contract, or in any grant of authority to an officer or agent of a contracting agency who ordered any materials, services, and facilities might invalidate the contract or commitment, the contracting agency (1) shall not take advantage of such defect or omission; (2) shall amend, confirm, or ratify such contract or commitment without consideration in order to cure such defect or omission; and (3) shall make a fair settlement of any obligation thereby created or incurred by such agency, whether expressed or implied, in fact or in law, or in the nature of an implied or quasi contract.

(c) Where a contracting agency fails to settle by agreement any claim asserted under this section, the dispute shall be subject to the provisions of section 113 of this title.

(d) The Administrator of General Services shall require each contracting agency to formalize all such obligations and commitments within such period as the Administrator of General Services deems appropriate. No person shall be entitled to recover compensation, to receive a settlement of any alleged obligation, or to obtain the benefit of any amendment, confirmation, ratification, or formalization of any alleged contract or commitment under the provisions of subsections (a), (b), (c), or (d) of this section, unless such person shall, on or before one hundred and eighty days after June 28, 1954, have filed a claim therefor with the contracting agency. [As amended, 68 Stat. 300, Sec. 1 (41 U.S.C. (Supp. V) 117).]